



Following is the address delivered by K. Kanag-Isvaran, President's Counsel, at the inauguration ceremony of the Asia Pacific Master's Degree Programme on Human Rights and Democratisation, University of Colombo 23 January

I am honoured to have been invited to share with you my thoughts on the role of the Judiciary in upholding democracy, and the lessons you can learn from the country's experience on the subject.

Being participants in the Asia Pacific Master's Degree Programme on Human Rights and Democratisation 2014/2015, of the University of Colombo, you are at the commencement of a truly invigorating journey.

I invite you to treat it not as an end in itself – to embellish your CV, perhaps, but as a means to energise, and take forward the values of democracy and human rights, for surely your future and the country's future would to warrant it.

The word 'Democracy' has several shades of meaning. It is one of the most used terms of the political vocabulary.

Recall that the framers of our first Republican Constitution of 1972 sold it as a 'Socialist Democracy'. The second Republican Constitution of 1978, styles itself 'The Democratic Socialist Republic of Sri Lanka'. I have not the time to regale you with the difference between 'Socialist Democracy' and 'Democratic Socialism'!

Suffice it to say that both the Constitutions claimed to be Democratic.

What's the magic in the word 'Democracy'?

So what is the magic in the word 'Democracy'? Democracy is a vital concept. Through its trans-cultural dimension, it touches the very fundamentals of the life of human beings in society. Though it has given rise to much written comment and reflection, there is no agreement as to its precise definition.

One can, therefore, only talk about the principles of democracy.

Democracy is a universally recognised ideal as well as a goal, based on

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common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences.

It is a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views and in the interest of the polity.

As an ideal, democracy aims essentially to preserve and promote the dignity and fundamental rights of the individual, and among others to achieve social justice and to create a climate that is favourable for peace.

Human rights, which you are going to master in the coming academic year, is also one of the inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being, regardless of their nation, location, language, religion, ethnic origin or any other status, e.g., 'boat people'. Human rights require empathy and the rule of law. Human rights cannot be taken away except as a result of due process based on specific circumstances and require freedom from unlawful imprisonment, torture and execution.

Democracy, therefore, provides the natural environment for the protection and effective realisation of human rights.

Realisation and enforcement

However, the recognition, acceptance and enthronement of the basic principles of democracy and of human rights in a country's constitution by itself are meaningless, unless they are enforceable at law in the hands of an independent Judiciary.

It is, therefore, imperative that one must move from a mere recognition of the basic principles of democracy and human rights to its realisation and enforcement.

Historical experience reveals that democracy cannot be attained without a system of government which divides power among the co-equal branches of power – the Executive, the Legislature and the Judiciary.

In such a system of governance, which recognises the doctrine of separation of powers, of which there are many varieties, the role of the Judiciary is paramount. It is the judiciary which channels power related



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conflicts through a legal process which uses agreed legal reasoning to interpret and apply pre-existing law. It is the judiciary which is in the forefront of the rule of law, which is fundamental to democracy. This must first be achieved.

Under the First Republican Constitution of 1972 all three powers of the government – the Executive, the Legislature and the Judiciary – were vested in the National State Assembly, the Supreme instrument of state power. Article 5 of the First Republican Constitution provided as follows,

'The National State Assembly is the supreme instrument of State power of the Republic. The National State Assembly exercises—

a) the legislative power of the People;

b) the executive power of the People, including the defence of Sri Lanka, through the President and the Cabinet of Ministers; and

c) the judicial power of the People through courts and other institutions created by law except in the case of matters relating to its powers and privileges, wherein the judicial power of the People may be exercised directly by the National State Assembly according to law.'

No separation of powers. The Constitution of 1978 whilst preserving the republican character, recognised the theory of separation of powers and Article 4, mandated that the legislative function should

be exercised by the Legislature, executive function by the Executive, and judicial function only by the Courts.

Article 4 of the 1978 Constitution reads as follows,

'The Sovereignty of the People shall be exercised and enjoyed in the following manner:-

a) the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognised, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members wherein the judicial power of the People may be exercised directly by Parliament according to law;'

In this we pass the test of democracy.

Judicial independence and impartiality

It is also vitally important in a democracy that the Judiciary as a whole be impartial and independent to be able to realise the basic principles of democracy and to be the arbit

er in power related conflicts between the state and the citizen.

Role of an independent judiciary is therefore a central component of any democracy, and is crucial for Rule of Law and human rights.

Judicial independence is composed of two foundations. [Barak (A) The Judge in a Democracy]

Firstly, every judge should be free to decide the matters before him without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and, secondly, that the Judiciary is independent of the Executive, and the Legislature, and has jurisdiction, directly, or by way of review, over all issues of a judicial nature.

These two foundations are cumulative. Neither is sufficient by itself. Only together do the two guarantee the independence of the judiciary. These two foundations are the independence of the individual judge and the independence of the judicial branch.

Personal independence of a judge is a constitutional principle. It means that the judge is subject to no authority other than the law.

Institutional independence is also a crucial condition, because judge's personal independence is incomplete unless it is accompanied by the institutional independence of the Judicial branch, designed to ensure that the Judicial branch can fulfil its role in protecting the constitution and its values.

Personal independence and institutional independence are protective walls which prevents the Legislature and Executive branches from influencing the way judges realise their role as protectors of democracy and

its core values.

You break these protective walls and the checks and balances mandated by the doctrine of separation of powers, you will have anarchy and the demise of the Rule of Law.

Impeachment of 43rd Chief Justice

In Sri Lanka, the impeachment motion to remove the 43rd Chief Justice brought to the fore and underscored the importance of the role of the Judiciary in upholding democracy. This sordid saga posed a severe threat to the continuity of democratic values and democracy itself in the country.

The 17th Amendment to the Constitution, which was introduced in the year 2001 establishing the independent institutions to conserve, secure and protect fundamental democratic values, was felled with one murderous swoop by the 18th Amendment to the Constitution in the year 2010 and reverted the country to the dark ages.

I have not the time, in a 10-minute presentation to go into the depths of this dark page of our history, or analyse its impact on the role of the Judiciary, but it is a lesson to be learnt and remembered if democratisation is to continue and we wish to ensure that the judges are given the freedom to be personally and institutionally independent to protect and safeguard democracy in Sri Lanka.

However, all appears not to be lost.

Just a few days ago the sanitising warmth of the early breezes of democracy and the rule of law appears to have been permitted to blow, flow and permeate into the body politic. Making you feel a little serendipitous! It is perhaps a harbinger to the full realisation of the principles of democracy and of human rights and of a truly independent

Judiciary. I wish this Programme of the University of Colombo and the students of the Master's Degree every success in your endeavours. Thank you.

Restoring independence of Judiciary; a sine qua non

THE band that Lady Justice wears to cover her eyes signifies 'objectivity' as such people who are called upon to adjudicate disputes must necessarily be above board. Adjudicators have a very high responsibility of ensuring that justice is meted out objectively, without fear or favour and in a fair, equitable and impartial manner.

This is the cornerstone of judicial responsibility and integrity. In order to exercise this sacrosanct principle, judges must demonstrate erudition hence a person who is properly trained and learned in law must occupy the position. One's learning also not sufficient but conduct too adds to the equation.

Genesis of the crisis

During the Rajapaksa Administration the Judiciary was functioning smoothly, but all of a sudden, the judicial bias on the part of former CJ Dr. Shirani Bandaranayake hit rock bottom when people came to know that her husband had been appointed Chairman of the National Savings Bank. This was a political appointment made by then President Mahinda Rajapaksa knowing full well that this appointment would interfere with the proper exercise of duties by the former Chief Justice Dr. Shirani B.

The judicial bias is a serious threat to the scales of justice. One question that struck the private and official bar was whether appointment of CJ's husband would likely to influence the conduct of the CJ. The press reports do not clearly indicate that CJ had requested that her husband be appointed as Chairman of a State institution or whether then President had done it voluntarily.

Nevertheless, this was a situation the husband of CJ Dr. Shirani B should have avoided at all cost.

If a judge is biased, a litigant cannot expect fairness and equity because the judicial reasoning would blunt the application of fairness, equity and logic. There would be convoluted arguments from the Bench. In other countries judicial bias is considered a serious erosion of the confidence reposed in the Judiciary by the people especially litigants and the 'would be' litigants.

In the case In Re Pinochet, the case had to be re-heard because it was later found that one of the judges, that is Lord Hoffman, had been found to have had close links with Amnesty International.

Lady Hoffman had been a Director of Amnesty International (AI). AI is an organisation whose objectives are to promote human rights across the world.

The case against Pinochet, the former President of Chile, was that he had been involved in violating human rights and conventions on crimes against humanity especially during his authoritarian rule in Chile. The Lord Hoffman, without disclosing his wife's involvement with AI, hearing this case is clearly a case in point where judicial bias might have had some impact. The reason being that Lord Hoffman's wife was a human rights activist. The former CJ's husband too got embroiled in a conflict over the share transfer of The Finance Ltd. and the Government was pursuing a case against him.

Controversy surrounding Divi Neguma Bill

When Divi Neguma bill was placed before the parliament, it was discov-



Dr. Shirani Bandaranayake

ered that the bill had certain provisions that encompass the devolved functions and duties of provincial administration which are demarcated in the 13th Amendment to the Constitution.

The Constitution is clear as to the procedure dealing with provincial powers. The civic minded citizens had the guts to challenge the Bill on the grounds that the bill was inconsistent with Article, 154 G(3) of the Constitution which provides that "no Bill in respect of any matter set out in the Provincial Council List shall become law unless such Bill has been referred by the President, after its publication in the gazette and before it is placed on the Order Paper of Parliament, to every Provincial Council for the expression of its' views thereon, within such period as may be specified in the reference".

The former CJ Dr. Shirani B pointed out this matter in her determination, whereupon the Government withdrew the Bill from the Order Paper and set about getting the PCs to agree to the passing of this Bill.

This judgment really infuriated the Rajapaksa Administration and put a damper on Minister Basil Rajapaksa's effort to get Divi Neguma taking off the ground. The

former CJ Dr. Shirani B had given a correct interpretation and Rajapaksa Administration should well have been aware of the legal implications resulting from such a scenario – before proceeding with such a bill.

Since the Northern Provincial Council had not been formed and non-existent at the time the bill was presented, the Rajapaksa Administration was on the horns of a dilemma. Basil Rajapaksa was not willing to revise or redraft the Bill.

The administration resorted to a childish exercise of getting the signature of the Governor of the Northern Provincial Council. The legal challenge resurfaced again and former CJ Dr. Shirani B gave a scathing judicial reasoning on the validity of such an exercise but her interpretation had nothing do with politics but it was the correct interpretation as had been confirmed by many legal luminaries, including the International Commission of Jurists. Her final judgment had been analysed by many legal scholars and have found it to be free from any personal bias.

Vengeance unleashed

The Rajapaksa Administration went into panic mode and swiftly moved the Government Parliamentary group to impeach her and to remove her from the office of CJ by the procedure established in the parliament and the extraordinary speed with which she was removed was even quoted in the international fora such as in Geneva and other international reports, compared to the lethargy demonstrated in implementing LLRC recommendations. The whole country watched the bewildering political drama. This exercise had a damaging effect on the former Presidents PR ratings because this was preceded by the Sarath Fonseka saga.

Dr. Shirani B was disgraced by the certain members of the committee who inquired into her alleged misdeeds and she had no legal means of defending her position. She moved

the Court of Appeal by a writ petition to nullify the proceedings of the Parliamentary Committee. The then Attorney General was an amicus curie for the case argued his legal reasoning on the basis that he has no partiality but just being an amicus curie, means the friend of the court. The Court of Appeal dismissed the Parliament Select Committee report and the decision was conveyed to the Speaker.

There was a clear battle between the Judiciary on one side and Executive and the Legislature on the other, each asserting that the boundaries of each pillar of the constitution must not be encroached upon by the other. By that time former CJ Mohan Peiris had been appointed and there was a clear physical presence of the private political goons and government forces around Hulftsdorp to ensure that Dr. Shirani B is sent to oblivion.

The resulting legislative stampede to remove her had one obvious legal flaw. The procedural requirement of the Constitution had not been met. Dr. Shirani B simply gave way but never resigned, hence the post of CJ never fell vacant. The article 107(2) requires that Parliament must present an address to the President, requesting him to remove the judge. There is a clear deficiency in meeting the constitutional requirement. Is this yet another blunder by the former President Rajapaksa? Did he not listen to legal advice on the impeachment procedure?

When former CJ Mohan Peiris was in office, the former Attorney General who intervened at the Court of Appeal's writ petition case as amicus curie decided to appeal the decision to Supreme Court, yet another legal manipulation without a precedent, and the Court of Appeal decision was then reversed by the Supreme Court.

Morality of the issues for citizens to ponder

The office holder of the Chief

Justice is a person who must command respect from the lower ranks of the judiciary and citizens and his conduct must always be above suspicion. The former CJ Dr. Shirani B had been too close to Rajapaksa family and had broken the centuries-old tradition of keeping aloof from politics.

Dr. Shirani B had taken a picture with Rajapaksa family when Namal Rajapaksa took oaths as an Attorney-at-Law. These are the incidences that Judges should avoid. The former CJ Mohan Peiris too had been seen at 'Carlton' celebrating New Year with Rajapaksa family, had been a member of the delegation to Vatican and was also seen at Temple Trees on the day election results were announced. All these are serious issues that border on the judicial ethics.

The Bangalore Principles of Judicial Conduct has identified six principles that must be upheld viz., (i) Judicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects. (ii) Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. (iii) Integrity is essential to the proper discharge of the judicial office. (iv) Propriety, and the appearance of propriety, are essential to the performance of all of the activities of the judge. (v) Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office. (vi) competence and diligence are prerequisites to the due performance of judicial office.

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